Q-1 Motor Express, Inc. *and* General Drivers, Warehousemen and Helpers Local 89, affiliated with International Brotherhood of Teamsters, AFL–CIO. Case 9–CA–29180

May 23, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The principal issue presented in this case is whether the Respondent's failure to provide the Union with notice and an opportunity to bargain about a decision to change from a single-driver system to a team-driver system and to transfer bargaining unit work to a new terminal in Lafayette, Indiana, violated Section 8(a)(5) and (1) of the Act.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified below, and to adopt his recommended Order as modified and set forth in full below.

The Respondent began truck delivery operations from a terminal in Clarksville, Indiana, in 1990. Since May 19, 1991, pursuant to a Board remedial bargaining order,[4] the Union has represented a bargaining unit of full-time and regular part-time drivers and driver-mechanics employed by the Respondent at the Clarksville terminal.

The Respondent's primary customer is the A.O. Smith Corporation, a manufacturer of automotive steel frames. Smith has a "just in time" production system, requiring that deliveries of automotive parts and components arrive in time for immediate use on the assembly line. In order to accommodate Smith's system, drivers based at the Respondent's Clarksville terminal would pick up a load from Smith's Milwaukee plant, deliver it to Smith's Corydon, Indiana subassembly plant, and return to Clarksville. After refueling the tractor, another driver would immediately slip into the driver's seat and repeat the Clarksville-Milwaukee-Corydon run. All the approximately 10–15 drivers employed at the Clarksville terminal operated as single drivers, i.e., they drove alone on their routes.

At a December 8, 1991 meeting with the Clarksville drivers, the Respondent's president, James E. Schroering, announced that, effective December 15, the Respondent was changing from a single-driver system to a team-driver system. Under the planned team system, two drivers would share each Clarksville-Milwaukee-Corydon run. Schroering told the drivers that a team operation was the only way he could operate safely and pass a U.S. Department of Transportation audit.[5] Schroering also announced that he intended to operate out of Clarksville with 12 or 13 drivers and 6 trucks. The majority of the drivers were unhappy with the prospect of team driving, and Schroering remarked that he expected some of the drivers to quit rather than operate as team drivers. The Respondent neither notified nor bargained with the Union about this change.

At the same meeting, Schroering told the drivers that he intended to move his main dispatch terminal to Lafayette, Indiana. Schroering suggested that there would be single-driver work available at a terminal in Warsaw, Indiana, and at the new Lafayette terminal for those drivers who did not want to do team driving. In response to a driver's question, Schroering stated that he did not know whether he intended to maintain the Clarksville terminal.

Schroering also instructed drivers to remove their personal vehicles from the premises of the Clarksville terminal and to park instead at the Ryder truck leasing lot in Jeffersonville, Indiana, a short distance from the Clarksville terminal. Thereafter, the Respondent used that Ryder lot instead of the Clarksville terminal.[6] The Respondent's last day of operation out of the Ryder lot was in February 1992. At all subsequent times, drivers from the Lafayette terminal performed the work that unit drivers had previously performed from the Clarks-

[1] On February 3, 1993, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further contends that the judge's findings are tainted with bias and prejudice against the Respondent. We find this allegation to be without merit. Our review of the record and the judge's decision reveals no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias.

[3] For the reasons stated by the judge, we agree with his findings that the Respondent violated Sec. 8(a)(1) of the Act by interrogating job applicants John Michael Parihus and Shawn Densford regarding union membership and union sympathies and by suggesting to employees that there were no funds available for Christmas gifts because the money had been spent on the litigation of unfair labor practices in another case. Contrary to the Respondent, we find that the latter violation was clearly encompassed by the allegations of the complaint. We also agree with the judge, for the reasons stated in his opinion, that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide notice to and bargain on request with the Union concerning its decision to change its Clarksville operations from a single-driver to a team-driver system.

[4] See *Q-1 Motor Express, Inc.*, 308 NLRB 1267 (1992), enfd. 25 F.3d 473 (7th Cir. 1994).

[5] Schroering testified that his decision to change to a team system was based on testimony at the previous unfair labor practice hearing and the ancillary district court proceeding that drivers routinely falsified the number of driving hours on their logs.

[6] The record is not clear whether all the Clarksville work was done out of the Ryder lot or whether some of that work was relocated to Lafayette.

ville terminal or the Ryder lot. As of September 22, 1993, the Respondent employed between 10 and 15 drivers at the Lafayette terminal operating the delivery run between Milwaukee and Corydon on a single-driver basis.[7]

The judge separately considered the legality of the change to team driving and the relocation of unit driving work to Lafayette. He found that the decision to change from single drivers to teams directly affected bargaining unit drivers' terms and conditions of employment and did not alter the scope and direction of the Respondent's business. He thus found that the Respondent's failure to bargain about this decision violated Section 8(a)(5) of the Act.

Addressing the relocation of unit work from Clarksville to Lafayette, the judge applied the Board's analysis of the obligation to bargain about plant relocation decisions in *Dubuque Packing Co.*, 303 NLRB 386 (1991). The judge found that the General Counsel had established that the Respondent's decision to transfer driver delivery operations to Lafayette[8] had an impact upon bargaining unit work and was unaccompanied by a basic change in the nature of its operation. Thus, the General Counsel made a prima facie showing that the Respondent's relocation of work from the Clarksville terminal was a mandatory subject of bargaining. The judge further concluded that the Respondent had not rebutted the prima facie case.

We agree with the judge that the Respondent unlawfully failed to bargain about the decision both to switch to team driving and to transfer work to the Lafayette terminal, but we find no need to apply the *Dubuque* analysis to them. The Respondent at its December 8, 1991 meeting with the Clarksville drivers announced its unilateral decision to switch to team driving, and by failing to give the Union notice of and an opportunity to bargain over this decision, we find that the Respondent failed to satisfy its bargaining obligation. But the Respondent's decision to switch to team driving cannot be viewed in isolation because it was only one part of its plan that it had devised unilaterally. The Respondent expected that some or all of its employees would resign rather than switch to team driving, and it had decided that in that case it would relocate the Clarksville work to Lafayette. In this regard, the Respondent's president, James E. Schroering, testified that "from the time I had that December 8 meeting, I was pro-actively getting located and getting applications and getting ready in Lafayette in case there was a mass exodus from Clarksville. I had to be prepared for anywhere from zero to twelve resignations from day one on the 15th."[9] On the other hand, the Respondent concedes in its brief that it would have kept the Clarksville facility open and that it would have continued to run teams out of it if the drivers had been willing to drive in teams rather than singly.

Thus, under these circumstances, the decision to relocate unit work from Clarksville to Lafayette is not severable from the decision to change from a single-driver to a team-driver system, and the Respondent's bargaining obligation over both decisions was the same. The Union had a right to receive notice of and an opportunity to bargain over the Respondent's entire plan. Meaningful bargaining over the team-driver system could only occur if the Union knew that without such a system the Respondent believed that it could not continue to operate out of the Clarksville facility and would relocate the unit work to the Lafayette facility, and, conversely, that the Clarksville facility would remain open if the Respondent's perceived need for team driving could be accommodated. Accordingly, we find that the Respondent's failure to bargain over its unilateral decision to relocate unit work from Clarksville to Lafayette violated Section 8(a)(5) and (1) of the Act.[10]

[7] Some of the Clarksville employees were either terminated or resigned their employment because of the change in operation. It is unclear whether any of them transferred to Lafayette.

[8] The General Counsel did not allege that the relocation of the Clarksville terminal to the Ryder lot was unlawful. For purposes of our analysis we will refer to the Respondent's relocation of work from Clarksville to Lafayette even though the Respondent in fact relocated the work from Clarksville to Ryder and then to Lafayette.

[9] Schroering also testified that he hoped that the Lafayette location would aid the Respondent in winning an additional contract with its customer A.O. Smith at some future date. The speculative nature of this asserted reason, however, is illustrated by Schroering's further testimony that, "for over a year," customer A.O. Smith had told Schroering that it planned to use the Respondent to carry a new load of parts for the Japanese customer Isuzu. Schroering, however, described the situation as a "catch 22," because the "Japanese companies are holding off to see if the U.S. government is going to make them do it. So, they've got U.S. suppliers set up and I'm going to haul the product if someone ever makes them use U.S. suppliers." From this testimony, it is thus clear that Smith's ability to secure this additional source of business was far from certain and that the immediate establishment of a Lafayette terminal was unrelated to Smith's remote possibility of increased business. In any event, the legality of the Respondent's decision to open a terminal in Lafayette for new business is not at issue here. The complaint challenges the transfer of existing unit work from Clarksville to Lafayette as a corollary of the decision to change to team driving at Clarksville.

[10] We adopt the judge's finding that Sean Densford's remarks to the Respondent's official did not disqualify him for reinstatement. Further, we have modified the judge's recommended Order and notice by deleting the names of employees entitled to backpay as a result of the Respondent's unlawful failure to bargain with the Union over the change from single drivers to team drivers. Rather, we leave to compliance proceedings the issue of which employees are entitled to backpay. We have also modified certain provisions of the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

We also adopt the judge's recommendation that the Respondent be ordered to restore its Clarksville operations to their status as of the week of December 8, 1991, when the Respondent actually operated on a single-driver basis out of the Ryder facility in Jeffersonville. At the compliance stage of this proceeding, the Respondent may introduce evidence that was not available prior to the September 22–23, 1992 unfair labor practice hearing, if any, to demonstrate that

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Q-1 Motor Express, Inc., Lafayette, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide notice to and an opportunity to bargain collectively with General Drivers, Warehousemen and Helpers Local 89, affiliated with International Brotherhood of Teamsters, AFL–CIO, as the exclusive representative of its employees in the appropriate unit set forth below, over its decisions to change from a single-driver operation to a team-driver operation and to relocate its Clarksville, Indiana terminal to Lafayette, Indiana. The appropriate unit is:

> All employees of the Respondent employed as truck drivers at or out of the Respondent's Clarksville, Indiana, terminal, but excluding all guards and supervisors as defined in the Act.

(b) Coercively interrogating job applicants concerning their union activity or union sympathies.

(c) Implying to employees that it is withholding a Christmas gift, or other benefit from them, in reprisal for their resort to the Board's proceedings to vindicate their rights under the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union with respect to its decisions to change from a single-driver operation to a team-driver operation and to relocate its Clarksville, Indiana terminal to Lafayette, Indiana, and to reduce to writing any agreement reached as a result of such bargaining.

(b) Resume its terminal operations at the Ryder location, at Jeffersonville, Indiana, and restore the single-driver system for bargaining unit drivers as it was during the week of December 8, 1991.

(c) Within 14 days from the date of this Order, offer to employees whom the Respondent terminated because they declined to work as team drivers or who resigned or ceased their employment because of the Respondent's change from a single-driver system to a team-driver system, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make whole employees whom the Respondent terminated because they declined to work as team drivers or who resigned or ceased their employment because of the Respondent's change from a single-driver system to a team-driver system for any loss of pay or benefits suffered by them by reason of the Respondent's decision to change from single driver to team driver, less any net interim earnings, plus interest. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, to each bargaining unit employee, who was employed at Respondent's Clarksville, Indiana terminal on December 8, 1991, a copy of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, concurring.

I agree that the Respondent's decision to relocate the Clarksville terminal to Lafayette, Indiana, is not severable from the Respondent's unlawful unilateral change in operation from a single-driver to a team-driver system and, therefore, the Respondent's failure to bargain over that decision violated Section 8(a)(5) and (1) of the Act. I would, however, find the Respondent's failure to bargain about the relocation decision unlawful even if I did not agree that it was made in furtherance of the unlawful change. In doing so, I would overrule *Dubuque Packing Co.*, 303 NLRB 386 (1991), to the

restoring these operations would be unduly burdensome. *Lear Siegler, Inc.*, 295 NLRB 857 (1989). The Respondent is also permitted to introduce, in compliance, any evidence that it would be unable to operate on a single-driver basis out of the facility in Jeffersonville without violating current Department of Transportation rules or regulations. See, generally, *Coronet Foods*, 316 NLRB 700, 702 fn. 10 (1995).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

extent that it restricts the analysis of a relocation decision to labor costs. In my view, the Act requires decision bargaining where the reasons underlying the relocation of unit work are amenable to bargaining and not solely to those decisions which implicate labor costs. And the issue is particularly vital and central to the new global marketplace of competitive pressure which affects both employers and unions as well as the public interest.

The appropriate starting place in this analysis of when bargaining is required with regard to relocation is the relevant Supreme Court precedent: *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In *Fibreboard*, which forms the backdrop for *First National Maintenance*, the Court held that the subcontracting of maintenance work was a mandatory subject within the meaning of the Act. The Court concluded that the language of the Act mandating bargaining over a "condition of employment" plainly covers a decision which involves termination of employment and that the inclusion of "contracting out" within the statutory scope of collective bargaining promotes the peaceful settlement of industrial disputes. 379 U.S. at 210–211. The Court further found that the existence of contracting out provisions in numerous collective-bargaining agreements indicates the subject's "amenability" to the collective-bargaining process. Id. at 211–212.

In *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), the Court held that an employer's partial closure of its business operations is not a mandatory subject of bargaining within the meaning of the Act.[1] Relying on Justice Stewart's concurrence in *Fibreboard*, the Court defined the subject matter which constitutes a mandatory subject of bargaining by identifying three categories of management decisions: (1) decisions, such as choice of advertising and promotion, product type and design and financing arrangements, which have only an indirect and attenuated impact on the employment relationship and therefore no attendant obligation to bargain; (2) decisions such as the order of succession of layoffs and recalls, production quotas, and work rules, which are almost exclusively "an aspect of the relationship" between employer and employee and therefore a clear obligation to bargain; and (3) decisions such as the partial closure at issue which have a direct impact on employment but also focus only on the economic profitability of the employing enterprise and, as such, neither clearly covered nor clearly excluded from the terms and conditions over which Congress has clearly mandated bargaining. 452 U.S. at 676–677. To determine whether this third category of decision is a mandatory subject of bargaining, the Court noted that the purpose of requiring bargaining over certain subjects is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 452 U.S. at 678 (quoting *Fibreboard*, 379 U.S. at 211). The Court further reasoned that

> [T]he concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. [452 U.S. at 678.] [Citations and footnotes omitted.]

Expressing concern, however, over management's need for speed, flexibility and secrecy in its decisionmaking, the Court required that the subject matter's amenability to the bargaining process be balanced against the burdens that bargaining would place on management:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of business. [452 U.S at 679.] [Citations and footnotes omitted.]

Turning to the issue of when a management decision in the third category is a mandatory subject of bargaining, it is clear from both *First National Maintenance* and *Fibreboard* that the crucial inquiry is whether bargaining over that decision will advance the neutral purposes of the Act. When such a decision is amenable to resolution through collective bargaining, I would find that a bargaining obligation exists. Where an employer's decision is motivated by labor costs, the union clearly has substantial "control or authority" over the basis for the employer's decision. 452 U.S. at 687. There are other instances, however, in which bargaining will be required when the reasons underlying the relocation decision do not implicate labor costs. In those circumstances, a union could offer concessions or make new proposals which might alter or outweigh the considerations driving the employer's decision to relocate and bargaining may lead to a mutually acceptable solution.

[1] I have been critical of the Court's decision in *First National*. See Gould, *Fifty Years under the National Labor Relations Act: A Retrospective View*, 37 Lab. L.J. 235 (1986); *The Supreme Court's Labor & Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Colo. L. Rev. 1 (1981); and Agenda for Reform: The Future of Employment Relationships and the Law (MIT Press) (1993) at 172–173. But, I am, of course, bound by the Supreme Court's view of this matter.

Under the Board's decision in *Dubuque*, an employer's decision to relocate is considered amenable to resolution through the bargaining process only when that decision implicates labor costs. In "harmonizing" the Court's decisions in *First National Maintenance* and *Fibreboard*, the Board concluded that, in *First National*, the employer's decision involved no intention to replace discharged employees, a change in scope and direction of the enterprise, and the size of the management fee, a factor over which the union had no control. 303 NLRB at 390–391. In *Fibreboard*, the employer's decision involved the replacement of existing employees, did not alter the company's basic operation, and was motivated by a desire to reduce labor costs. Id. Accordingly the Board concluded that the decision to relocate was "more closely analogous" to the subcontracting decision found to be a mandatory subject in *Fibreboard*. Id. at 391. The Board further found that

> [B]ecause a relocation decision, like the *Fibreboard* subcontracting decision, involves the replacement of one group of employees with another, it logically follows that the differential in the labor costs of the two groups may be of considerable importance to the employer. The union representing the incumbent workers has the ability to influence the employer's decision. Thus, the decision to relocate is susceptible to resolution through collective bargaining. [Id. at 391.]

Based on this reasoning, the *Dubuque* test allows an employer to rebut the General Counsel's prima facie case by showing by a preponderance of the evidence that (1) labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate. Id.

The mere fact, however, that labor costs are a factor in a decision is hardly dispositive of the question of whether the dispute between the parties is, as described in *First National Maintenance*, 452 U.S. 666 (1981), "amenable" to the bargaining process. Further, by giving labor costs a dominant role in the interpretation of *First National Maintenance* as it relates to relocation, the Board absolves the employer of the obligation to bargain once that employer asserts that labor costs are not a consideration in its decision. The result is a clear invitation to posturing, game playing, and obfuscation in an attempt to conceal and deceive. The possibility of deception is further aided by the limited amount of information that unions have access to as part of the bargaining process. Ultimately, under the Board's current standard, the answer to the question of whether the employer's decision implicates labor costs will be learned only after time consuming, lengthy litigation. Equally important, in the bargaining which precedes litigation, there will be an incentive not to share information which might establish the wrong motivation in ensuing NLRB proceedings. In short, *Dubuque* encourages all of the impulses which harm the collective-bargaining process and the exchange of information and consequent dialogue upon which it is frequently predicated. In so doing, it works at cross purposes which the public policy of the United States which encourages the practice and procedure of collective bargaining.

Fortunately, in dicta, the Supreme Court in *First National Maintenance* stated that the parties are obliged by the duty to bargain in good-faith obligation to negotiate about procedures on such management decisions—even plant closures altogether—which may be incorporated in collective-bargaining agreements.[2] As the result, it is possible to see just how "amenable" the relocation issue is to the collective-bargaining process. A prime example of this is contained in the 1994–1997 collective-bargaining agreement between General Electric and the International Union Electronic, Electrical, Salaried, Machine and Furniture Workers (AFL–CIO) (GE-IUE National Agreement). The provisions were adopted in 1991 and it appears their purpose and accomplished objective is to provide for certainty on relocation bargaining. Thus, under the agreement a decision to relocate production work, whether it is engaged in "for the purpose of securing cheaper labor rates or for the purpose of moving work to a more modern, efficient facility . . . carries with it many of the same obligations respecting bargaining with the union."[3]

Under the GE-IUE procedure the company gives notice of an intent to relocate, describing the work to be relocated and provides the number of employees whose jobs would be lost. GE-IUE National Agreement, article II § 5(b)(1). If the union requests bargaining, the parties meet and bargain about the intended relocation for up to 45 days. GE-IUE National Agreement, article XXII § 5(b)(2). At the end of the 45-day period the company will announce its decision as to whether it will proceed with the work relocation. Id. The specific reasons for the intended work relocation are provided during the 45-day bargaining period. GE-IUE National Agreement, article XXII § 5(b)(3). The bargaining takes place regardless of the reasons. However, if labor costs are a "significant factor" which prompt the intended relocation, the company will provide comparative wage data, payroll allowances and employee benefit costs which have motivated its decision. Id. Within 6 months following the announcement of intent, the

[2] 452 U.S. at 681–682. See also Gould, *The Supreme Court's Labor & Employment Docket in the 1980 Term: Justice Brennan's Term*, supra, fn. 12 at 8.

[3] Nordstrom, *Relocations*, a paper presented at a University of Pennsylvania symposium in November 1995 (unpublished).

work may be relocated. GE-IUE National Agreement, article XXII § 5(b)(1).

The virtue of this approach lies in a number of considerations. The first is that genuine reasons for decisions are provided and ideas are sought about alternatives to the intended or actual decision. In the words of an official of General Electric:

> [We] recently announced an intent to outsource work in one of our Motors plants because a substantial investment in technology was thought to be needed which we were unwilling to finance. Upon bargaining over the proposed action, a team of union-represented employees redesigned the Motor component in question in such a radical way that the technology we had planned to utilize by outsourcing the work to a vendor was found not be needed. The redesign of the Motor component saved 24 jobs while allowing the Company to achieve its productivity goals.[4]

At the same time, employees have the time and opportunity to adjust to the possibility of job loss if that is what is required. The union is brought into the thinking process and the contract substitutes an impasse definition, i.e., 45 days, for the inherently vague impasse concept that is adumbrated in the Supreme Court's holding in *Borg-Warner*.[5]

To sum up, the practical implications of *Dubuque* promote wasteful litigation in a manner which erodes some of the Act's purposes. The experience of the collective-bargaining process proves that the relocation issue is "amenable" to resolution through that process. As the GE-IUE experience indicates, if the parties are concerned with the vagueness inherent in bargaining to the point of impasse as required by the Court's decision in *Borg-Warner*, they can always address the problem in the collective-bargaining agreement itself and, in so doing, establish their own approach to impasse as General Electric and IUE have done.

In summary, because I believe that collective bargaining before relocation is preferable to years of litigation afterwards, and that relocation issues can be effectively addressed through the collective-bargaining process encouraged by the Act, I would apply the "amenable to bargaining" standard in determining whether an bargaining obligation exists over an employer's relocation decision. This standard is consistent with the Court's language in *First National Maintenance*, and, in my view, does not operate on the erroneous assumption that a union could not contribute anything to negotiations over an employer's decision that does not implicate labor costs.

In the instant case, even though nonlabor costs triggered the Respondent's decision, the nature of the decision is such that it is quite conceivable that a union could offer alternatives that would affect the Respondent's decision to relocate. The Respondent transferred existing unit work from its Clarksville terminal to Lafayette and the relocation was unaccompanied by a basic change in the nature of the Respondent's operation. The Lafayette terminal represented a savings in rent for the Respondent and could be used as a switching point for drivers on deliveries. Concessions offered by the Union or new proposals made by it might have mitigated the Respondent's concerns underlying the relocation decision. Whether such alternatives or concessions can be the basis for genuine dialogue can never be known until collective bargaining has taken place.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to provide notice to and an opportunity to bargain collectively with General Drivers, Warehousemen and Helpers Local 89, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of our employees in the appropriate unit set forth below, over

[4] Id. at 4.

[5] As Justice Harlan opined in his dissenting opinion, the "adoption of so inherently vague and fluid a standard is apt to inhibit the entire bargaining process because of a party's fear that strenuous argument might shade into forbidden insistence." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 352 (1958). I have also been critical of the Court's decision in *Borg-Warner*, not only because it is difficult for parties to know when the moment of impasse has been reached but also because the decision has allowed both the Board and the Court to indirectly control the substance of bargaining by determining which issues are more directly important to conditions of employment as in *First National*. See Gould, *Agenda for Reform: The Future of Employment Relationships and the Law*, supra, fn. 12 at 170–172, 178; and *The Supreme Court's Labor & Employment Docket in the 1980 Term: Justice Brennan's Term*, supra, fn. 12 at 18. Of course, I am bound by the *Borg-Warner* decision. But the GE-IUE procedure emphasizes the superiority of the parties' own devices under a process which promotes the exchange of information as an alternative to litigation under the Act. Our function is to promote such bargaining both at the negotiation of the contract itself and thereafter.

our decisions to change from a single-driver operation to a team-driver operation and to relocate our Clarksville, Indiana terminal to Lafayette, Indiana. The appropriate unit is:

> All employees of Q-1 Motor Express, Inc. employed as truck drivers at or out of our Clarksville, Indiana terminal, but excluding all guards and supervisors as defined in the Act.

WE WILL NOT coercively question job applicants concerning their union activity or union sympathies.

WE WILL NOT imply to you that we are withholding a Christmas gift, or other benefit from you, because you filed an unfair labor practice charge with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union with respect to our decisions to change from a single-driver operation to a team-driver operation and to relocate our Clarksville, Indiana terminal to Lafayette, Indiana, and to reduce to writing any agreement reached a result of such bargaining.

WE WILL resume our terminal operations at the Ryder location, at Jeffersonville, Indiana, and restore the single-driver system for the drivers in the unit described above, as it was during the week of December 8, 1991.

WE WILL, within 14 days from the date of the Board's Order, offer employees who the Respondent terminated because they declined to work as team drivers or who resigned or ceased their employment because of the Respondent's change from a single-driver system to a team-driver system full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights for privileges previously enjoyed.

WE WILL make employees who we terminated either because they declined to work as team-drivers, or who resigned or ceased their employment because of our change from a single-driver system to a team-driver system, whole for any loss of pay or benefits suffered by them by reason of our decision to change from single driver to team driving, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of employees who we terminated either because they declined to work as team-drivers, or who resigned or ceased their employment because of our change from a single-driver system to a team-driver system, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

Q-1 MOTOR EXPRESS, INC.

James E. Horner, Esq., for the General Counsel.
James H. Hanson, Esq. (Scopelitis, Garvin, Light & Hanson), of Indianapolis, Indiana, for the Respondent.
Ralph Logan, Esq., of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Louisville, Kentucky, on September 22 and 23, 1992. The Union, General Drivers, Warehousemen and Helpers Local 89, affiliated with International Brotherhood of Teamsters, AFL–CIO, filed the original charge on December 26, 1991,[1] and an amended charge on February 18, 1992. The Regional Director for Region 9 issued the complaint on May 29, 1992, alleging that the Respondent, Q-1 Motor Express, Inc. (Q-1), had violated Section 8(a)(1), (3), (4), and (5) of the Act. Q-1, by its timely answer to the complaint, denied that it had committed the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Q-1, I make the following

FINDINGS OF FACT

I. JURISDICTION

Q-1, a corporation, with office and facility in Clarksville, Indiana, has been, at all times material to this case, engaged in the interstate transportation of freight by truck. During the 12 months preceding the issuance of the complaint in this case, Q-1, in conducting its trucking business, performed services valued in excess of $50,000 in States other than the State of Indiana. Q-1 admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Q-1 also admits, and I find that, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Q-1, a motor carrier, began operations as a trucking concern in late February 1990, with a truck terminal on Old Potters Lane in Clarksville, Indiana. Since its inception, Q-1's president, James E. Schroering (J.E.), has been responsible for its operations, and his father, Vice President James J. Schroering Jr., has been responsible for sales. Q-1 is a federally authorized contract motor carrier and is subject to the regulatory oversight of both the Interstate Commerce Commission and the U.S. Department of Transportation. Since February 1990, Q-1's primary shipper has been A. O. Smith Company of Milwaukee, Wisconsin, a manufacturer of auto-

[1] All dates are in 1991 unless otherwise indicated.

motive steel frames. As of December 1, Q-1's 14 drivers were based at its Clarksville, Indiana terminal.

As of December 1, Q-1's drivers drove their tractors and trailers from Clarksville to A. O. Smith's Milwaukee plant, where they received shipments of automotive frames. Q-1 adapted its operation to accommodate A. O. Smith's "just in time" system. Under this scheme, deliveries of automotive parts and components arrive in time for immediate use on the assembly line. This arrangement eliminates the need for inventories and their cost.

As of December 1, Q-1 drivers, based at its Warsaw, Indiana terminal, delivered some of A. O. Smith's frames to a subassembly plant at Bellevue, Ohio. Q-1 drivers based at its Clarksville, Indiana terminal, delivered the remainder of the frames to a subassembly plant at Corydon, Indiana, located about 18 miles from Clarksville. This case involves the drivers, who, as of December 1, were based at Q-1's Clarksville terminal.

Drivers on the Clarksville-Milwaukee-Corydon run operated individually. Their routine was to drive approximately 400 miles to Milwaukee, pick up a load at A. O. Smith, and deliver it to Smith's Corydon plant, located about 18 miles from Q-1's Clarksville terminal. After completing the delivery, the driver would refuel his tractor at a Ryder Corporation facility in Clarksville and return to Q-1's Clarksville terminal. Immediately, another driver would slip into the driver's seat and drive to Milwaukee to pick up another load at A. O. Smith.

In May, the Union began an organizing campaign at Q-1's Clarksville terminal. Thereafter, the Union and three employees filed unfair labor practice charges against Q-1, which led to the issuance of a complaint in *Q-1 Motor Express*, (Cases 9–CA–2865–1,–2, and –3, and Case 9–CA–28762).[2]

Following a hearing on the complaint, at Louisville, Kentucky, on December 2, 3, and 4, Administrative Law Judge Walter H. Maloney issued a decision, in which he found, inter alia, that an organizing drive among Q-1's Clarksville drivers and driver-mechanics had begun in May, and that, since May 19, the Union had been the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time truck drivers and driver-mechanics employed by [Q-1] at its Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act.

Judge Maloney found that Q-1 had violated Section 8(a)(1) of the Act in 15 instances, including 6 not alleged in the complaint. He also found that Q-1 had violated Section 8(a)(3) and (1) of the Act by discharging three employees because of their union membership and union activity. Finally, Judge Maloney found that Q-1 had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above.

The Board, in *Q-1 Motor Express*, 308 NLRB 793 (1992), affirmed Judge Maloney's findings of violations, except for the six 8(a)(1) violations not alleged in the complaint. The Board also agreed with the judge that a bargaining order was warranted in light of the remaining unfair labor practices which he found.

The issues presented in the instant case, which is a sequel to the cases heard by Judge Maloney in December 1991, are whether Q-1 violated:

> Section 8(a)(1) of the Act by interrogating job applicants regarding union membership and union sympathies; Section 8(a)(1), (3), (4) and (5) of the Act by unilaterally withholding an annual Christmas gift, and; Section 8(a)(5) and (1) of the Act, by changing from a single driver operation to a team operation, and by relocating its operations.

B. *Interrogation of Job Applicants*

On August 12, J.E. interviewed over-the-road driver John Michael Parihus for possible employment at Q-1. J.E. explained that he had an opening for a driver, in a single operation, to run to Milwaukee 3 days per week. In the course of the interview, J.E. asked if Parihus was in the Union. Parihus answered that he was not presently in the Union, but had been a member of Local 89 during his employment at S & T Industries.

J.E. responded, in substance, that he had asked the question because there were some employees, who had attempted to "get a union started," and who were no longer employed at Q-1. J.E. also declared that he did not want a union at Q-1, and that there would not be a union there.[3]

In determining whether an employer's interrogation of a job applicant is coercive, the Board considers various factors, including the employer's history of hostility toward union activity, the interrogator's position in the employer's management, the nature of the information sought, and the immediate circumstances surrounding the interrogation. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

There is ample ground for finding coercive circumstances here. J.E.'s interrogation of job applicant Parihus occurred only 3 months after Q-1 had resorted to a variety of unfair labor practices in resisting the Union's attempt to organize its employees, as found by the Board in *Q-1 Motor Express*, supra. Among Q-1's unfair labor practices were threats to discharge all of its drivers rather than deal with a union, and the discriminatory discharges of three employees in reprisal for their union activity. J.E., who, as the Board found id., had made the earlier unlawful threats and had carried out the unlawful discharges, was Q-1's president.

A further factor considered here is the immediate context in which J.E. raised his question regarding Parihus' union

[2] I based my findings of fact in the background portion of this decision on J.E.'s testimony and the ALJ's findings of fact in his decision in Cases 9–CA–2865–1, –2, and –3, and Case 9–CA–28762.

[3] I based my findings regarding J.E.'s interrogation of employee Parihus on the latter's credible testimony. On direct examination, J.E. testified that he thought he had asked Parihus if his former employer had a union shop. However, when Q-1's counsel, by leading question, asked if he had asked Parihus "whether he was a union member," J.E. seemed reluctant to say yes or no. Instead, he repeated his earlier testimony to the effect that he had asked if Parihus' previous employer had operated a union shop. In any event, J.E.'s testimony did not include a denial that his remarks on August 12 had included the question which Parihus had attributed to him. J.E. did not impress me as being a frank witness, with regard to his remarks to Parihus on August 12. Accordingly, I have credited Parihus, who testified about this incident in a candid manor.

membership. J.E. asked Parihus about his union membership and, at the same time, referred to employees who had tried to obtain union representation, and were no longer "with them." J.E. made no effort to separate the departure of the employees from their union activity. In this context, and in light of Q-1's demonstrated union animus, the memory of J.E.'s question was likely to deter Parihus from accepting or maintaining union membership, if Q-1 hired him. Indeed, J.E.'s remarks did not include any assurance that Parihus was free to join a union without fear of displeasing Q-1.

In sum, I find that J.E. coercively interrogated Parihus about his union membership, and thus impaired the latter's right, under Section 7 of the Act, to join a labor organization. I further find, therefore, that by this interrogation, Q-1 violated Section 8(a)(1) of the Act. *Lewis Mechanical Works*, 285 NLRB 514, 520 (1987).

The second episode of alleged coercive interrogation by J.E. occurred in October, when he discussed job applicant Shawn Densford's possible employment with Q-1 as a driver. On that occasion, Densford had submitted his job application and was asking J.E. about Q-1's need for additional drivers. J.E. answered that he would be hiring. In the course of his remarks, J.E. asked Densford if he "had a big mouth like [Densford's] Uncle Marty did." Densford asked J.E. to explain his question.

J.E. began by stating, in substance, that Marty was an agitator, who, along with other drivers, was attempting to obtain union representation for Q-1's employees. J.E. went on to say that he, J.E., did not want to hire another employee, who might join in that effort. Thus, J.E.'s explanation showed that his reference to "a big mouth" was a metaphor for "union activist." Densford disassociated himself from Marty's union activity, telling J.E. that "what Marty did was Marty's business, that had nothing to do with me." In early November, J.E. hired Densford to drive for Q-1.[4]

Applying the *Rossmore House* formula to this second interrogation, I find that it was coercive. J.E.'s question and response to Densford's request for an explanation showed hostility toward employees who actively supported the Union, and a reluctance to take on additional employees, who were likely to provide further support for the Union. Nor did J.E. assure Densford that he was free to support a union, while in Q-1's employ. In light of the background of unfair labor practices, as found in *Q-1 Motor Express*, supra, J.E.'s question and explanation were likely to discourage Densford from actively supporting the Union, after Q-1 hired him. I find that by J.E.'s question directed at Densford's union sentiment, Q-1 violated Section 8(a)(1) of the Act. *Lewis Mechanical Works*, supra.

C. *The Christmas Gift*

Shortly before Christmas 1990, Q-1's vice president, James J. Schoering Jr. (J.J.), on his own initiative, and without consultation with J.E. or any other member of Q-1's management, gave a fruit basket and a turkey to each of the Clarksville drivers. J.J. paid for the fruit baskets and turkeys out of his own pocket. Q-1 did not reimburse him. Nor did Q-1 add the value of J.J.'s gifts to the recipients' wages on its records or for tax purposes. J.J.'s gift was unprecedented in Q-1's 8-month history. The total value of the basket and the turkey was from $22 to $25. In 1990, Q-1 did not grant any bonus to its drivers.

I find from J.E.'s testimony that in 1991, Q-1 did not intend to give a Christmas bonus to its drivers. However, on December 8, at a meeting with his Clarksville drivers, an employee asked J.E. what he intended to give the drivers for Christmas. J.E. answered, in substance, that the drivers' Christmas presents had been spent on litigation in Louisville.[5] Q-1's posthearing brief conceded, and I find, that by his reference to "Louisville," J.E. was referring to the unfair labor practice proceedings held in Louisville, Kentucky, on December 2, 3, and 4, in the cases reported in *Q-1 Motor Express*, supra, and to an ancillary court proceeding arising out of the allegations in those cases. I also find from reviewing Judge Maloney's decision, that Q-1 employees Donald Ray Denham, Dan W. Stevens, and Anthony Lupo were charging parties in three of the cases tried on December 2, 3, and 4.

The complaint alleges that Q-1 violated Section 8(a)(5), (4), (3), and (1) of the Act by withholding its annual Christmas gift during December. I turn first to the contention that Q-1 had an obligation to bargain with the Union about a Christmas gift. Assuming that Q-1 had an obligation to bargaining collectively with the Union regarding the wages of the Clarksville employees, that obligation would extend to a gift which had matured to a form of compensation, or had become a term and condition of employment. *Benchmark Industries*, 270 NLRB 22 (1984). When J.J. gave turkeys and fruit baskets to Q-1's Clarksville employees for Christmas 1990, he did so without concerning himself about the donees' work performance or other employment-related factors. This circumstance deprived those items of the status of compensation or of a bonus. I have also found that J.J.'s action was unprecedented in the brief history of Q-1. Thus, under Board policy, when Christmas 1991 approached, the turkey and fruit basket had not become a term and condition of employment. Compare *Southern States Distribution*, 264 NLRB 1, 3 (1982) (Thanksgiving turkey—6 years). In my view, the facts show that the Christmas turkey and fruit basket, which Vice President J.J. gave to Q-1's Clarksville employees in 1990, was a gift. *Benchmark Industries*, supra. Accordingly, Q-1's unilateral decision to withhold them in 1991 did not violate Section 8(a)(5) of the Act.

Section 8(a)(3) and (1) of the Act makes it an unfair labor practice to discriminate against employees in regard to "tenure of employment or any condition of employment to . . . discourage membership in any labor organization." It follows that if its employees' union activity were a motivating factor in Q-1's withholding of a Christmas gift in 1991, such withholding violated Section 8(a)(3) and (1) of the Act. *Harowe Servo Controls*, 250 NLRB 958, 1039 (1980). Further, such conduct would also violate Section 8(a)(4) and (1) of the Act if a motivating factor were the filing of charges

[4] I based my findings of fact regarding J.E.'s interrogation of Shawn Densford, on the latter's undenied, full, and forthright testimony.

[5] My findings of fact regarding J.E.'s response to the question regarding a Christmas gift are based on the testimony of Shirley Glisson, who impressed me as being a conscientious witness, carefully searching his recollection. Glisson seemed more careful about his choice of words, than were witnesses Densford, Parihus, and Tomes, who asserted that J.E.'s response was to a question about bonuses.

or the giving of testimony in the unfair labor practice cases involved in *Q-1 Motor Express*, supra. *EDP Medical Computer Systems*, 284 NLRB 1286, 1296 (1987).

If its employees' statutorily protected activity was a motivating factor in a Q-1 decision to withhold a Christmas present from them, Q-1 would be found to have violated the Act, unless Q-1 demonstrated, as an affirmative defense, that it would have taken the same action, even in the absence of the employees' protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402–403 (1983), approving *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In the instant case, there was no showing that, prior to his meeting with his Clarksville employees on December 8, J.E. had made any decision regarding a Christmas present for Q-1's Clarksville drivers. J.E.'s response to the employee's question about such a present did not reflect such a decision by Q-1's president, who controlled its labor policy. Instead, I find that J.E.'s response suggested that there were no funds available for a Christmas gift because of the unfair labor practice proceedings before Judge Maloney, which arose from charges filed by the Union and three employees. This message was likely to discourage employees from looking to the Act and the Board for protection of their right, under Section 7 of the Act, to engage in union activity. I find, therefore, that J.E.'s response violated Section 8(a)(1) of the Act.

Also, I find there is insufficient evidence to support the allegations that Q-1 withheld a Christmas gift from its Clarksville drivers because of their union activity, or because they filed charges, or gave testimony in a Board proceeding. I shall recommend dismissal of the allegations that by withholding such a gift Q-1 violated Section 8(a)(3) and (4) of the Act.

D. *The Changes in Operations*

1. The facts

J.E.'s meeting with the Clarksville drivers, which the employees were required to attend, began at 5 p.m., on Sunday, December 8. The meeting's main topic was J.E.'s announcement that, effective December 15, he was changing from a single-driver operation to a team system. Under the team system, two drivers would share the round trip between Clarksville and Milwaukee. One member of the team would drive to Milwaukee, while the other rested in the truck's cab. On the return trip, they would reverse roles. J.E. explained that he had decided on this change after hearing testimony at the Board hearing, and at the ancillary district court proceeding, that Q-1 drivers were falsifying their logs. He said that a team operation was the only way he could operate safely and pass a Department of Transportation audit. J.E. also said he intended to operate out of Clarksville with 12 or 13 drivers and 6 trucks. Q-1 did not notify or consult with the Union about this change in Q-1's driving system.[6]

At the same meeting, J.E. also told the assembled drivers that he intended to move his main dispatch terminal to Lafayette, Indiana. He also said that Mike and Leah Conrad would be in charge of that terminal. J.E. suggested that if anyone did not want to do team driving, there would be single-operator work at Q-1's Warsaw, Indiana facility, and at its new Lafayette terminal. When driver Todd Tomes asked if Q-1 intended to maintain its Clarksville terminal, J.E. replied that he did not know. Again, Q-1 ignored the Union. J.E. made this decision without notification to or consultation with the Union.[7]

J.E.'s announcements provoked negative responses among his drivers. Driver Shirley Glisson said he did not understand the move to Lafayette. He also wanted to know how the drivers would be teamed. J.E. answered that he expected the drivers to pick their own partners. Driver James Logsdon complained that Q-1 had hired him as a single driver and he did not want to run as a team driver. Logsden warned that he would probably quit. J.E. answered, in substance, that team driving was the only way Q-1 could operate. I find from Shawn Densford's testimony, that most of the drivers at the meeting of December 8 were unhappy at the prospect of team driving. J.E. heard the complaints and remarked that he expected some of the drivers to quit rather than operate as team drivers.

At the meeting on December 8, J.E. instructed his drivers to remove their personal vehicles from premises occupied by the Q-1 terminal, on Old Potters Lane, in Clarksville. J.E. further advised the drivers to park their personal vehicles at Ryder's truck leasing lot, at Jeffersonville, Indiana, a short distance from the Clarksville site. Thereafter, Q-1 used that Ryder location instead of its former Old Potters Lane terminal.

Immediately after the meeting, on December 8, driver Todd Tomes asked J.E. to find something else to do, because he wanted to keep working for J.E., but preferred "being home a lot." Later in the evening, as the two were driving to the Lafayette terminal, J.E. asked Tomes if he would move to Lafayette. Tomes said he would not sell his house and move to Lafayette.

Tomes continued to work for Q-1 that week, completing three runs to Milwaukee and back. His last day of work was Saturday, December 14. On the following Monday, J.E. phoned, and asked Tomes to come to his office. Tomes went to J.J.'s office on December 17, 2 days after team driving out of Clarksville went into effect. Tomes met driver John Parihus at J.E.'s office. Both drivers said no when J.E. asked if they were interested in team driving. J.E. then handed each a separate letter for their respective signatures. Tomes and Parihus found on reading their respective letters, that they asserted that the signatory had quit of his own free will, and had not been fired. Both employees refused to sign, arguing that they had not quit. Tomes view was that his job "had ended." J.E. repeatedly asked Parihus and Tomes to sign the letter. The two refused.

[6] I based my findings regarding J.E.'s announcement of team driving on his and employee Shirley Glisson's testimony.

[7] My findings of fact regarding J.E.'s announcement of the Lafayette terminal's opening are based on his and employee Glisson's testimony. However, where there testimony diverged, I credited Glisson. Of the two, Glisson seemed to have a firmer recollection, and impressed me as being more candid. At times, while testifying about the notice of the meeting, which he issued, or when recounting his remarks to the drivers at the meeting of December 8, J.E. expressed uncertainty concerning the authenticity of the proffered exhibit, which bore his signature, and about his recollection. He seemed reluctant to testify freely about these matters.

Driver Parihus hired on with Q-1 as a single driver. He refused to switch to team driving, because he believed it would be hard to sleep in the cab of a Q-1 truck. According to Parihus' credited testimony, Q-1's trucks were not suitable for team driving. He feared that during an 8-hour drive he might sleep only 3 hours, if he were lucky. Parihus thought team driving under such circumstances would be dangerous for him and his partner.

Driver Shirley Glisson began team driving on December 15. That week, he and his partner made five round trips between Clarksville and Milwaukee. Q-1's trucks did not operate during the weeks of December 22 and 29. On January 5, dispatcher Leah Conrad telephoned Glisson to assign a trip to him and told him that driver Logsden would be his partner, instead of driver Mark Louden. Glisson did not want to team with Logsden, who insisted on 12-hour driving shifts instead of the lawful 8-hour shift. Glisson refused to team up with Logsden, and followed up with his reason. Conrad insisted that Glisson had to go with Logsden. Glisson reiterated his reason for rejecting Logsden. As Glisson spoke, Conrad hung up. Since January 5, Q-1 has not offered any work to Glisson.

Thereafter, in a conversation with Q-1 Vice President Joseph L. Smith, Glisson asked for a meeting with J.E. Glisson told Smith he did not want to drive with Logsden, and wanted to straighten the matter out with J.E. When Smith said that J.E. would not be available for a few days, Glisson agreed to "leave it like it is for right now until I talk to [J.E.] personally." Glisson never received an opportunity to meet J.E.

From December 15–20, drivers Shawn Densford and James Logsdon operated as a team. Late in the afternoon, on January 2, 1992, Densford and J.E. conferred in the cab of a Q-1 truck about employment at Q-1's new terminal at Lafayette, Indiana. J.E. remarked that he needed drivers at Lafayette and that if Densford moved, he would be "one of the top drivers." Densford said he could not move because he did not have the money. J.E. continued unsuccessfully to urge Densford to move. After dropping J.E. off in Clarksville, Densford proceeded to Corydon, delivered his load, and returned to Clarksville.

Densford picked up driver Paul Robinson at Clarksville. Densford and Robinson completed a round trip between Clarksville and Milwaukee on January 3, 1992, which turned out to be Densford's last day of work at Q-1.

On returning to his home, on January 3, Densford contacted his regular driving partner, James Logsdon, who said he had a cut finger and could not drive. Later on the same day, Densford telephoned J.E. and asked if Densford would continue to have a job at Q-1. After scolding Densford for calling him at home, J.E. raised the matter of Densford's moving to Lafayette. Densford rejected the idea.

J.E. told Densford that because of his low seniority, if there were an odd number of drivers available for assignments, he would be the odd man out. Densford suggested that he be permitted to run as a single driver. J.E. refused, saying, "We're not going to run singles." J.E.'s remarks caused Densford to infer that his continued employment by Q-1 rested on his agreeing to drive from Lafayette.

Densford became impatient and told J.E. to fire him and get it over with. J.E. offered to send termination papers to Densford, who urged him to do so. Densford ended the conversation with: "We live in the same home town. I'll see you around."[8]

On the following day, Q-1 Vice President Joseph Smith telephoned Densford and asked him what he was doing. Densford answered that he was getting ready to deliver a load to Corydon, Indiana. Smith replied, " No, you're not." Smith went on to explain that J.E. had directed him to discharge Densford because J.E. believed that his safety was in jeopardy, as he had taken Densford's remarks about the smallness of the town as a threat. The conversation ended with Densford remarking that the town was small; that Smith would be seeing him again; and that Smith would have to deal with him.[9]

On January 9, 1992, Q-1 issued a discharge letter to Densford. The letter stated that Q-1 had discharged Densford effective January 4, 1992, because he had made veiled threats to both J.E. and Smith.

Driver James Hogan's employment at Q-1 began on April 7, 1990, and continued through the balance of 1990, and all of 1991. Q-1 assigned him to the Clarksville-Milwaukee run. Hogan began team driving for the week of December 15. He was on vacation for the next 2 weeks.

On January 4, 1992, Hogan went to Q-1's Clarksville office to pick up his vacation check, and asked dispatcher Leah Conrad about his employment for the following week. Conrad replied that Q-1 had moved Logan's truck to Lafayette, Indiana. Conrad also advised that Q-1 had moved her and her husband, Mark, to Lafayette.

Hogan remarked, in substance, that he perceived that Q-1 wanted him to quit. Conrad answered that if Hogan intended to quit, he must sign a paper announcing that he was giving the job up. Upon receiving Conrad's assurance that signing such a paper would deprive him of unemployment compensation, he drew up a letter of resignation addressed to Conrad, stating:

> Do [sic] to change in Company policy I feel that I would be better off quiting [sic] effective Jan 4th. But I would like to also say I have enjoyed having a job with Q-1.

Hogan signed the letter and submitted it to Conrad. Q-1 has not employed Hogan since January 4, 1992.

Q-1's last day of operations out of Jeffersonville was in February 1992. As of September 22, 1992, Q-1 employed between 10 and 15 drivers at its Lafayette terminal. These drivers operate the route between Milwaukee and Corydon, Indiana, mostly on a single-driver basis, hauling A. O. Smith products.[10]

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[8] With respect to the portion of J.E.'s and Densford's conversation about Densford's work, I have credited both participants. However, I have drawn my findings regarding Densford's demand to be discharged and his closing remarks from his testimony. Of the two, Densford seemed to be the more candid witness. J.E. seemed anxious to color his testimony regarding Densford's closing remarks not with a recollection of the spoken words, but with description aimed at casting it in an unfavorable light.

[9] I based my findings regarding the conversation of January 4, 1992, on the testimony of the participants. Densford did not deny making the closing remark which Smith attributed to him.

[10] In its posthearing brief (p. 23), Q-1 argues that its decision to open the Lafayette terminal was "a strategic business decision" be-

Continued

2. Analysis and conclusions

The General Counsel contends that Q-1 violated Section 8(a)(5) and (1) of the Act by changing its method of operation and relocating its Clarksville, Indiana terminal operation at Lafayette, Indiana, all without prior notice to the Union, and without giving the Union an opportunity to bargain with respect to these changes. Q-1 insists that it had no statutory obligation to bargain with the Union about either of the changes. For the reasons set forth below, I find merit in the General Counsel's contention.

Section 8(d) of the Act, which defines the duty to bargain collectively imposed by Section 8(a)(5) of the Act, requires an employer to "meet . . . and confer in good faith [with his employees' majority representative] with respect to wages, hours and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Items falling within the language of Section 8(d) are mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Accordingly, an employer is prohibited from changing matters related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed alterations. *NLRB v. Katz*, supra at 743.

The Board, in *Q-1 Motor Express*, supra at 1208, affirmed Judge Maloney's finding that the Union achieved majority status on May 19, and that Q-1's bargaining obligation arose on that date. Thus, on and after that date, Q-1 had a statutory duty to bargain collectively with the Union with respect to changes related to its Clarksville drivers' wages, hours, and conditions of employment. *Trading Port, Inc.*, 219 NLRB 298, 302 (1975).

I find that whether drivers operate alone or as teams of two is a condition of employment and also relates to hours of employment. The choice impacts on the drivers' hours of driving, and their freedom to choose where they will spend nondriving hours.

Q-1 argues in substance that compliance with Federal regulations limiting driving hours mandated the change from single-driver to team operations. Thus, according to Q-1 there was nothing to bargain about. However, Q-1, by its move to Lafayette and reinstitution of single-driver operations on the Milwaukee run, refuted this argument. Moreover, if afforded notice and opportunity to bargain about the change to team driving, the Union might have offered one or more alternatives which might have satisfied Federal regulations and permitted Q-1 to serve A. O. Smith efficiently.

Q-1 contends that the principles announced in *Dubuque Packing Co.*, 303 NLRB 386 (1991), apply to its change from single drivers to teams. In that case, the Board reconsidered the tests set forth in *Otis Elevator Co.*, 269 NLRB 891 (1984), for determining whether particular management decisions concerning employees are mandatory subjects of bargaining. Specifically, the Board, in *Dubuque*, rejected the *Otis Elevator* tests in favor of a burden-shifting test with alternative bases for an employer's defense after the General Counsel made a prima facie showing. However, the Board clearly stated that the burden-shifting test was to be applied only to management decisions to relocate unit work. *Dubuque* at 390 fn. 8. Therefore, in determining whether Q-1 had an obligation to bargain with the Union regarding the change from individual drivers to teams, I have looked to the teachings of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and *Otis Elevator Co.*, supra.

In *Otis Elevator*, supra at 891, the Board held that Sections 8(a)(5) and 8(d) of the Act did not require the employer to bargain collectively about its decision to discontinue its research and development activities in Mahwah, New Jersey, and to consolidate them with its operation in East Hartford, Connecticut, because the decision "turned upon a change in the nature and direction of a significant facet of its business." In reaching this conclusion, the Board looked to the Court's construction of Section 8(d) of the Act, as set forth in *First National Maintenance*, supra at 676–677. There, the Court excluded "management decisions such as choice of advertising and promotion, product type and design, and financing arrangements" and decisions "involving the scope and direction of the enterprise" from the scope of Section 8(d) of the Act.

I find that Q-1's decision to change from single drivers to teams did not involve any of the management decisions which the Court, in *First National Maintenance*, excluded from the scope of Section 8(d) of the Act. The decision did not alter the scope and direction of its business. After the change went into effect on December 15, there was no change in Q-1's business. It continued to use its trucks to pick up automobile components at A. O. Smith's Milwaukee, Wisconsin plant and deliver them to A. O. Smith's Corydon, Indiana plant. During the week of December 15, Q-1's teams continued to use a location near Clarksville as their point of origin. The equipment and the commodity it hauled were the same as they were before the change went into effect. The route also remained the same.

Q-1's decision to change from single drivers to teams impacted directly on the conditions under which the bargaining unit drivers would work, as they drove Q-1's route between Clarksville and Milwaukee. In my view, Q-1's decision to change from single drivers to teams was "an aspect of the relationship" between employee and employer which Section 8(d) of the Act embraces. *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). Indeed, I find that Q-1's decision in this instance falls within the scope of the statutory duty to bargain as construed in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964), where the Court held that:

> [T]he replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of bargaining under Sec. 8(d).

Accord: *Torrington Industries*, 307 NLRB 809 (1992). There, as here, the decision under scrutiny involved bargaining unit employees' terms of employment which were not a matter of core entrepreneurial concern.

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cause its purpose was "to establish a strategic presence in Lafayette for its customer, A. O. Smith." However, Q-1 did not make reference to the record of the hearing before me to support this assertion. Nor have I found any testimony or evidence in the record showing that Q-1 opened the Lafayette terminal for the purpose urged by its brief. Instead, I find that the record suggests that Q-1 opened the Lafayette terminal to return to single-driver operations.

In sum, I find that Q-1 had a duty to provide notice to and bargain on request with the Union concerning its decision to change its Clarksville operations from single drivers to teams. By failing to provide the Union with that notice, I find that Q-1 violated Section 8(a)(5) and (1) of the Act.

In *Dubuque Packing*, supra at 391, the Board announced the following test for deciding whether an employer's decision to relocate is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work was unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

In the instant case, the General Counsel has shown that Q-1's decision to relocate its Clarksville terminal operation 170 miles away, in Lafayette, impacted on bargaining unit work, but was not accompanied by a basic change in the nature of Q-1's operation. Thus, I find that the General Counsel has made a prima facie showing that Q-1's relocation of its Clarksville terminal operation was a mandatory subject of bargaining.

I also find that Q-1 has not rebutted the prima facie case. Q-1 has not shown that the work performed by its drivers out of the Lafayette terminal differs significantly from the work of the Clarksville drivers. Nor has it shown that the work performed at Clarksville was entirely discontinued, or that Q-1's relocation decision altered the scope and direction of its business. Further, Q-1 has not availed itself of the alternative of showing that labor costs were not a factor, or that even if such costs were a factor in its decision to move the terminal operation from Clarksville to Lafeyette, the Union could not have offered labor cost concessions which could have reversed Q-1's decision to move.

Accordingly, I find that Section 8(d) of the Act required Q-1 to notify and, on request, bargain with the Union about the decision to relocate the Clarksville terminal operations in Lafayette. Q-1's failure to satisfy that requirement before implementing that decision violated Section 8(a), (5), and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Q-1 Motor Express, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, General Drivers, Warehousemen and Helpers Local 89, affiliated with International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truckdrivers and driver-mechanics employed by the Respondent at its Clarksville, Indiana terminal, exclusive of office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about May 19, 1991, the Union has been the exclusive collective-bargaining representative of all the employees in the appropriate unit described above.

5. By unilaterally changing from a single-driver to a team operation in the appropriate unit described above, on December 15, 1991, without prior notice to the Union and without affording the Union an opportunity to bargain, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally relocating a portion of its operations from Clarksville to Lafayette, Indiana, commencing on or about December 8, 1991, without prior notice to the Union and without affording the Union an opportunity to bargain, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By coercively interrogating job applicants regarding their membership in the Union and their union sympathies, and by implying to employees that it was withholding a Christmas gift from them in reprisal for their resort to the Board's proceedings to vindicate their rights under the Act, Respondent has violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent did not violate the Act by withholding a Christmas gift from its employees during December 1991.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has unlawfully made unilateral changes in the bargaining unit employees' terms and conditions of employment, I shall recommend that Respondent be ordered to restore its Clarksville, Indiana operations to their status quo as of the week of December 8, 1991, when Respondent elected to operate on a single-driver system out of the Ryder facility in Jeffersonville, Indiana. I shall also recommend that all the drivers employed at the Clarksville terminal as of that date, who Respondent terminated either because they declined to work as team drivers, or because they refused to move to Lafayette, Indiana, or who resigned or ceased their employment either because of Respondent's change from single driver to team driving, or be-

cause of Respondent's relocation of those operations at Lafayette, Indiana, be offered reinstatement at the restored terminal operation. Included in that group is Sean Densford. For I find, contrary to Respondent, that Densford's ambiguous remarks to J.E. on January 3, 1992, and to Vice President Smith on January 4, 1992, did not amount to a veiled threat of physical reprisal, which would disqualify him for reinstatement. I shall further recommend that Respondent be ordered to cease and desist from implementing unilateral changes in terms and conditions of employment of bargaining unit employees without giving notice to and bargaining with the Union on request. I shall also recommend that Respondent be ordered to make employees Todd Tomes, John Parihus, Shirley Glisson, Sean Densford, James Hogan, and any other unit employees whole for any loss of earnings or benefits they may have suffered as a result of their loss of employment due to either Respondent's unlawful change from single-driver operations to team operations or Respondent's unlawful relocation of its Clarksville, Indiana terminal operations to Lafayette, Indiana, less any interim earnings, if any. *Continental Winding Co.*, 305 NLRB 122 (1991). Interest on such backpay is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, in view of the fact that Respondent has closed its Clarksville, Indiana facility and will be operating out of Ryder's facility at Jeffersonville, Indiana, I shall recommend that Respondent mail to each bargaining unit employee who was employed at Clarksville on December 8, 1991, a copy of the attached notice marked "Appendix." (Omitted from publication.)

[Recommended Order omitted from publication.]